

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Nathan D. Schluter,

Petitioner,

vs.

City of Minneapolis,

Respondent.

**ORDER REGARDING
CITY'S MOTION FOR
SUMMARY DISPOSITION**

The above-entitled matter is pending before Administrative Law Judge Barbara L. Neilson on the motion of the City of Minneapolis for summary disposition. The City filed its motion on February 1, 2001, and the Petitioner filed his response in opposition to the motion on February 14, 2001. Oral argument regarding the motion was heard on March 7, 2001. Supplemental responses were filed on March 21 and 30 and, following the request of the Administrative Law Judge, on May 5, 10, and 22, 2001, at which time the record with respect to the motion closed.

Steven K. Marden, Attorney at Law, Marden Law Offices, 2100 Foshay Tower, 821 Marquette Avenue, Minneapolis, Minnesota 55402, appeared on behalf of Petitioner Nathan D. Schluter. James A. Cunningham, Jr., Assistant City Attorney, Office of the City Attorney, 333 South 7th Street, Suite 300, Minneapolis, Minnesota 55402-2453, appeared on behalf of Respondent City of Minneapolis.

NOW, THEREFORE, based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED:

(1) That the City's motion for summary disposition is DENIED; and

(2) That the parties participate in a telephone conference call on Monday, July 9, 2001, at 4:00 p.m. to discuss the scheduling of an evidentiary hearing with respect to the issue of whether the Petitioner received notice of the City's intention to discharge him and notice of his right to a veteran's removal hearing at his last known address, as discussed in the attached memorandum. At that time, counsel should also be prepared to address whether discovery will be necessary prior to the evidentiary hearing. The Administrative Law Judge will initiate the telephone conference call. Counsel should contact the Administrative Law Judge's secretary as soon as possible if the July 9 date is inconvenient.

Dated: June 27, 2001.

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department of Veterans Affairs is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Factual Background

Based upon the motion papers filed by the parties, it appears that the following facts are undisputed:

1. The Petitioner, Nathan D. Schluter, is an honorably discharged veteran who had four years of active service in the Army.^[1] As such, it appears the Mr. Schluter is a “veteran” within the meaning of Minn. Stat. § 197.447 and is entitled to the protections of the Veterans Preference Act.

2. The Petitioner was employed by the City of Minneapolis as a truck driver in the Public Works/Equipment Department. He was a member of Minnesota Teamsters Public and Law Enforcement Employees’ Union, Local 320.

3. The Petitioner and his wife separated in 1997 and lived in separate locations thereafter.^[2]

4. On August 25, 1997, an Ex Parte Order for Protection was issued for a duration of one year, requiring, *inter alia*, that the Petitioner have no contact with his wife and not enter his wife’s home (then located at 1241 Karth Lake Drive in Arden Hills, Minnesota).^[3]

5. In November of 1997, the Petitioner’s wife filed a petition for dissolution of their marriage. At that time, and until approximately December 1999, the Petitioner lived at 5044 Humboldt Avenue North in Minneapolis, Minnesota, and his wife lived at 1241 Karth Lake Drive in Arden Hills.^[4]

6. The Petitioner was convicted of Fifth Degree Assault in Ramsey County District Court on March 12, 1998, and was sentenced to 90 days in jail. He was also convicted of Gross Misdemeanor Stalking and Harassment in Ramsey County District

Court on March 12, 1998, and was sentenced to one year in jail. The Petitioner's wife was the victim in both of these Ramsey County matters.^[5] The Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree with respect to the dissolution of the marriage was issued in August, 1998.^[6]

7. The Petitioner was incarcerated from March 1998 through December 1998 in the Ramsey County Jail as a result of the above convictions.^[7]

8. The City discharged the Petitioner from his position with the City effective April 17, 1998.

9. Mary Jauman, who is the City's HR Senior Consultant for Public Works, sent a letter dated May 4, 1998, to the Petitioner at 1241 Karth Lane, Arden Hills, Minnesota 55112. The letter indicated that the Petitioner had been terminated from employment with the City's Department of Public Works effective April 17, 1998; summarized the reasons for the discharge; stated that the Petitioner had failed to attend or reschedule a departmental administrative hearing scheduled for April 17, 1998, to discuss his employment situation; and noted that an enclosed "Recommendation for Discharge" form "includes information on appeal rights that you may have." The reverse side of the "Recommendation for Discharge" form included the following notice regarding the right of veterans to a hearing:

**NOTICE TO EMPLOYEES OF LEGAL RIGHTS
DISCHARGE AND PROBATIONARY RELEASE**

* * *

Veteran Employees (Probationary and Permanent)

Any classified employee, holding a position by appointment or employment with the City . . . and who is a veteran separated from the United States military service under honorable conditions, has a right to a hearing prior to discharge No City employee who is a veteran can be removed or demoted except for incompetence or misconduct shown after a hearing, upon due notice, and upon stated charges presented in writing. Temporary employees who are veterans do not have a right to a hearing.

* * *

REQUESTING A HEARING

IMPORTANT: The employee should refer to the Civil Service Rules and/or the appropriate labor contract to determine what, if any, appeal rights he or she may have. The employee may choose whether to appeal this action through the Civil Service commission or through processes available through the labor contract, but may not appeal through both.

* * *

Requesting a Hearing: Veterans

A written request for hearing must be mailed to the Civil Service Commission within 60 calendar days of when the notice was served in person or was receipted for at the employee's last known address. The

60 days are counted from the first day after the notice was personally served or the date the notice was receipted by certified mail. If the 60th day falls on a Saturday, Sunday, or legal holiday, the request may be served on or before the following business day. The date of postmark must be within that 60-day period. The request for a hearing may be accompanied by the employee's statement of his or her version of the case. If such a request is not received within 60 days, the veteran's name will be removed from the service register.

**ALL REQUESTS FOR A HEARING AND APPEALS SHOULD BE MAILED
WITHIN THE REQUIRED TIMELINES TO:**

Minneapolis Human Resources Department/Civil Service Commission
250 South 4th Street, Room 100
Minneapolis, MN 55414-1339^[8]

10. The May 4, 1998, letter indicated that the reasons for the Petitioner's discharge were his failure to report the loss of his drivers license as required by Public Works policy within 24 hours of the loss or suspension of the license, in violation of Civil Service Rule 11.03 A 4; his failure to be available for call-out on March 6, 13, and 15, 1998, as required by the on-call policy, in violation of Civil Service Rule 11.03 B 1; his failure to be available for call-out and failure to show for two department meetings to discuss his employment on March 10, 1998, and April 17, 1998, in violation of Civil Service Rule 11.03 B 3; and his failure to report the loss of his driver's license as required and his driving of a City vehicle without a valid driver's license, in violation of Civil Service Rule 11.03 B 18. The letter asserted that the Petitioner failed to attend a departmental administrative hearing that was scheduled for April 17, 1998, at 10:30 a.m. to discuss his employment situation and did not call to reschedule the meeting. Because of this, the letter indicated that the City had no recourse other than termination from employment.

11. The May 4, 1998, letter and enclosed "Recommendation for Discharge" form were sent to the Arden Hills address by certified mail. Someone other than the Petitioner accepted delivery of these documents on May 8, 1998, and signed the certified mail receipt card.^[9]

12. By letter dated May 15, 1998, Paul Nelson, Business Agent for Local 320, appealed a grievance filed on behalf of the Petitioner to Step 2 of the Grievance Procedure as contained in the Labor Agreement between the parties. The grievance protested the "unjust termination" of the Petitioner and asked that the Petitioner be made whole and returned to work on the next available shift.^[10]

13. On or about October 17, 2000, the Petitioner filed a Petition for Relief under the Veterans Preference Act with the Department of Veterans Affairs. In his petition, the Petitioner alleged that he was unfairly released from employment with the City and membership in Teamsters Local 320. He asserted that he was not given

anything in writing, his phone calls were not returned, and his e-mails were not answered. He asked for reinstatement with seniority and back pay.

14. The Commissioner of Veterans Affairs issued the Notice of Petition and Order for Hearing initiating this contested case proceeding on November 6, 2000.

15. The City filed its motion for summary disposition on February 1, 2001. The Petitioner filed his initial response in opposition to the motion on February 14, 2001. Oral argument regarding the motion was heard on March 7, 2001. Supplemental responses were filed on March 21 and 30

16. By letter dated April 30, 2001, the Administrative Law Judge requested the parties' comments concerning what, if any, applicability the reports issued in *McKinney v. St. Paul Public Schools*,^[11] *Hodapp v. St. Louis County*,^[12] and *Johnson v. Duluth Airport Authority*^[13], and the cases on which they rely (including *Mack v. Hennepin County*^[14]) should have in the present case. Additional briefs addressing this issue were filed by the parties on May 5, 10, and 22, whereupon the record with respect to the motion closed.

- Based upon review of the parties' submissions, it appears that the disputed facts in this case include whether the Petitioner in fact received notice of the City's intent to discharge him and notice of his right to a veteran's removal hearing and whether the Petitioner in fact requested a leave of absence. In this regard, the Petitioner alleges that he never received notice of the City's intent to discharge him or notice of his right to a hearing under the Veterans Preference Act and also did not know about the grievance the Union filed on his behalf.^[15] The City argues that the Petitioner's assertion in this regard is not credible but contends that, in any event, service by certified mail to Petitioner's home address is sufficient to comply with the Act. In addition, the Petitioner contends that, prior to his incarceration, he asked his supervisor at the City for unpaid leave and work release privileges, and that this request was denied.^[16] The City did not file an affidavit addressing this point, but did file a letter dated May 27, 1998, in which Mary Jauman, HR Senior Consultant for Public Works, asserted that the Petitioner did not request a leave of absence at any time, and further stated that no leave time would have been granted even if it had been requested because the Public Works Department does not grant leaves of absence for incarceration.^[17]

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Motion for Summary Disposition

Summary disposition is the administrative equivalent of summary judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. The same standards apply.^[18] Summary disposition of a claim is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law.^[19] A material fact is one which is substantial and will affect the result or outcome of the proceeding depending on the determination of that fact.^[20] In considering a motion for summary disposition, the evidence must be viewed in the light most favorable to the non-moving party.^[21]

With a motion for summary disposition, the initial burden is on the moving party to show facts establishing a *prima facie* case for the absence of material facts at issue.^[22] Once the moving party has established a *prima facie* case, the burden shifts to the non-moving party.^[23] To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.^[24] The non-moving party may not rely on general assertions; significant probative evidence must be offered.^[25] The evidence introduced to defeat a summary disposition motion, however, need not be admissible trial evidence.^[26]

Legal Analysis

Minn. Stat. § 197.46 addresses the nature of the notice to be provided to veterans entitled to protection under the Veterans Preference Act. The statute provides in pertinent part:

Any veteran who has been notified of the intent to discharge the veteran from . . . employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.

The City asserts that it took sufficient steps to comply with the notice provisions set forth in Minn. Stat. § 197.46 when it sent written notice to the Petitioner's home address of the City's intent to discharge the Petitioner and the Petitioner's right to a hearing. The City argues (without supporting affidavit) that this written notice was sent to Petitioner's last known address on file with the City by both U.S. and certified mail, and emphasizes that the certified mail envelope was, in fact, accepted by someone at Petitioner's home. Although the City admits that the statute is silent on how the written notice is to be delivered, the City argues that service by mail is a well-established method of providing notice and contends that there is nothing in the Veterans Preference Act that requires an employer to investigate the accuracy of the home address provided by the veteran before sending notice of discharge and of the right to request a hearing. In addition, the City contends that it was reasonable and appropriate to send the notice to the address that it believed was the Petitioner's home address since the Petitioner informed his supervisor that he would be getting out on work release. The City further contends that the fact that the Teamsters filed a grievance relating to the Petitioner's discharge demonstrates that the Petitioner was aware that he had been discharged from his position. The City also argues that it strains credibility to believe that the Petitioner's union would tell him not to call but fail to disclose that a grievance had been initiated on his behalf. Because the Petitioner did not request a hearing within 60 days, the City urges that he be barred from asserting any right to a veterans preference hearing now, more than three years after his discharge.

The Petitioner contends that the City failed to give him proper notice of its intent to discharge and his right to request a hearing. The Petitioner alleges that he was incarcerated in Ramsey County Jail at the time and did not actually receive the notice of intent to discharge or notice of hearing rights sent by the City to the Arden Hills address. As a result, the Petitioner contends that he never received the written notice required by the statute. He emphasizes that he was under court order to have no contact with his wife at the time that the City's letter was mailed, and asserts that she was living at the Arden Hills address. The Petitioner points out that the Veterans Preference Act does not expressly require either mailed notice or abode service, and contends that the City when choosing the means by which to communicate with the Petitioner failed to ensure that the Petitioner actually received the required notice. He urges that the statute be construed to require that the veteran *actually receive* the written notice of intent to discharge and notice of hearing rights. The Petitioner indicates in his sworn affidavit that his supervisor knew that he was to be incarcerated in the Ramsey County Jail and that he asked for unpaid leave and work release privileges because of his pending incarceration. The Petitioner further contends that he was not aware that the union had filed a grievance on his behalf. Moreover, the Petitioner contends that it would not have been possible for him to exercise any rights he had since he was incarcerated during most of 1998. Finally, the Petitioner asserts that the reasons given by the City for his discharge are false and inadequate to sustain his termination, and that there are genuine disputes of material fact with respect to these matters and whether the City followed proper procedures in terminating him.

Because the Veterans Preference Act is silent concerning the manner of service of the notice of the right to hearing, it is appropriate to look to the rules of the Office of Administrative Hearings governing contested case proceedings for guidance concerning the proper mode of service. Those rules include a definition of "service." Minn. R. 1400.5100, subp. 9, defines "service" or "serve" and provides in pertinent part as follows:

"Service" or "serve" means personal service or, unless otherwise provided by law, service by first class United States mail or a licensed overnight express mail service, postage prepaid and addressed to the party at his or her last known address. An affidavit of service shall be made by the person making the service. Service by mail or licensed overnight express mail service is complete upon placing the item to be served in the mail or delivering it to the authorized agent of the express mail service. Personal service may be accomplished by either delivering a document to the person or by leaving a document at the person's home or place of business with someone of suitable age and discretion who resides in the same house or who is located at the same business address of the person to be served.

If a person is confined to a federal or state institution, a copy of the document must also be served upon the chief executive officer of the institution.

Postage shall be prepaid. Mail to a person other than a state agency shall be addressed to the last known address of the person. Agencies of the state of Minnesota may also deposit the document with the Central Mailing Section

Under this rule provision, it is evident that service by mail to a party's last known address is sufficient.^[27] Moreover, such service has been approved in prior cases considered under the Veterans Preference Act. For example, in *Johnson v. Duluth Airport Authority*,^[28] Judge Mihalchick concluded that the notice provided to the employee at his last known address complied with the notice requirements of Minn. Stat. § 197.46. In addition, in *Kozitka v. City of Detroit Lakes*,^[29] the Court of Appeals noted that notice was mailed to the veteran and held that the veteran "could have requested a veterans preference hearing within 60 days after receiving the City's proper notice of intent to discharge and notice of his rights under the VPA." It is reasonable to expect that employees will keep their employers informed of their proper mailing address and will make arrangements to ensure that they receive notices sent to that address. The Administrative Law Judge declines to rule that the Veterans Preference Act requires that the veteran actually receive the written notice of intent to discharge and hearing rights.

In determining whether the City provided adequate notice, it thus becomes critical to know whether the Arden Hills address was, in fact, Mr. Schluter's last known address from the perspective of the City. Counsel for the City made statements during oral argument to this effect, but no City employee filed a supporting affidavit. Moreover, Mr. Schluter's affidavit indicates that he did, in fact, inform his supervisor that he was going to be incarcerated in the Ramsey County Jail, and he has also provided documentation indicating that he lived at a different address on Humboldt Avenue in Minneapolis between approximately August of 1997 and December of 1999. As noted above, the Judge is required when considering a summary disposition motion to consider the facts in the light most favorable to the non-moving party, who is the veteran in this instance. The evidence provided by the City in support of its motion simply is not sufficient to compel the conclusion that the City is entitled to summary disposition on the notice issue. The Administrative Law Judge thus concludes that the questions of whether the Petitioner actually received or was informed of the proposed termination and hearing right; what address the Petitioner had provided to the City; what, if any, steps the Petitioner took to notify the City of a change of address; and whether the Petitioner in fact informed the City that he would be incarcerated in the Ramsey County Jail for a length of time involve genuine issues of material fact that are appropriate for hearing. These issues will be addressed in a limited evidentiary hearing to determine whether the notice issued by the City was, in fact, provided to the Petitioner's last known address. Should it be determined that notice was not properly provided and the Petitioner is entitled to a hearing under the Veterans Preference Act, the further substantive issues of whether the Petitioner was actually "removed" and, if so, whether the removal was for good cause will then be addressed in a further hearing. Because the parties' supplemental briefs revealed that there are genuine issues of material fact

regarding whether the City in fact viewed the Petitioner as having voluntarily resigned from or abandoned his job or in fact relied upon Civil Service Commisison Rule 13.04, that issue will be considered as part of the second hearing, if one is held.

Accordingly, a telephone conference call has been scheduled for July 9, 2001, at 4:00 p.m. to schedule a date for the evidentiary hearing. The Administrative Law Judge will initiate the call.^[30]

B.L.N.

^[1] See Petitioner's Form DD 214, attached to the Notice of Petition and Order for Hearing issued by the Department of Veterans Affairs.

^[2] Ex. DD, appended to Petitioner's May 22, 2001, letter.

^[3] Ex. CC, appended to Petitioner's May 22, 2001, letter.

^[4] Ex. BB, appended to Petitioner's May 22, 2001, letter.

^[5] Ex. DD, appended to Petitioner's May 22, 2001, letter.

^[6] Ex. DD, appended to Petitioner's May 22, 2001, letter.

^[7] Schluter Affidavit, ¶¶ 6-7; Ex. AA (appended to Petitioner's May 22, 2001, letter).

^[8] See reverse side of Ex. B appended to the City's Motion for Summary Disposition (bold type in original).

^[9] See Ex. C appended to the City's Motion for Summary Disposition; Schluter Affidavit, ¶ 8..

^[10] See Ex. D appended to the City's Motion for Summary Disposition.

^[11] OAH Docket No. 8-31000-11266-2 (1998).

^[12] OAH Docket No. 69-3100-6516-2 (1992).

^[13] OAH Docket No. 69-3100-4491-2 (1990).

^[14] 1996 WL 523818 (Minn. App. 1996) (unpublished).

^[15] Schluter Affidavit, ¶¶ 3, 5, 10, 13, 14, 16, and 19.

^[16] Schluter Affidavit, ¶ 9.

^[17] See letter of May 27, 1998, appended to the City's May 10, 2001, letter.

^[18] See Minn. R. 1400.5500 K (1991); Minn. R. Civ. P. 56.03.

^[19] Minn. R. Civ. P. 56.03.

^[20] *Highland Chateau, Inc. v. Minnesota Dep't of Public Welfare*, 356 N.W.2d 804 (Minn. App. 1984), *rev. denied*, (Minn. 1985).

^[21] *Grondahl v. Bulluck*, 318 N.W.2d 240 (Minn. 1982); *Nord v. Herreid*, 305 N.W.2d 337 (Minn. 1981).

^[22] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

^[23] *Minnesota Mutual Fire and Casualty Co. v. Retrum*, 456 N.W.2d 719, 723 (Minn. App. 1990).

^[24] *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

^[25] Minn. R. Civ. P. 56.05; *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

^[26] *Carlisle*, 437 N.W.2d at 715 (citing *Celotex*, 477 U.S. at 324).

^[27] Because the Petitioner was confined to the Ramsey County Jail and not a federal or state prison during the period in question, the portion of the rule relating to those confined to a "federal or state institution" is inapplicable.

^[28] OAH Docket No. 69-3100-4491-2 (1990).

^[29] No. C5-94-716, 1995 WL 1497 (Minn. App. Jan. 3, 1995). See also *Lewis v. Minneapolis Board of Education*, 408 N.W.2d 905 (Minn. App. 1987) (a mailed notice to the veteran of his hearing rights was not deemed inappropriate).

^[30] The Petitioner argues in his Supplemental Response that the notice on the reverse side of the City's "Recommendation for Discharge" form does not comply with the Veterans Preference Act because the language informs employees that the 60-day period runs from either "the first day after the notice was

personally served or the date the notice was receipted by certified mail.” As noted by the Court of Appeals in *In re McCreight*, No. C5-87-2060, 1988 WL 10467 (Minn. Ct. App. Feb. 16, 1988), ‘the [VPA] fails to set forth with specificity the form and content of the notice required.’ The Administrative Law Judge finds that the form used by the City was in substantial compliance with the provisions of the statute and was adequate to provide veterans with notice of their right to request a hearing within sixty days of receipt of the notice of intent to discharge, in accordance with the provisions of the statute. It is unnecessary to further address this argument in the context of this motion.